Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets	)	WT Docket No. 00-230

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

Lawrence R. Krevor
Vice President – Government Affairs
James B. Goldstein
Senior Attorney – Government Affairs
NEXTEL COMMUNICATIONS, INC.
2001 Edmund Halley Drive
Reston, Virginia 20191

Laura H. Phillips
Laura S. Gallagher
DRINKER BIDDLE & REATH LLP
1500 K Street, N.W., Suite 1100
Washington, D.C. 20005-1209
(202) 842-8800

Its Attorneys

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SUMMARY

Nextel supports the Commission's initiative to advance the development of secondary spectrum markets. The flexible leasing policies adopted in the *Report and Order* are a good first step towards providing spectrum licensees with the ability to expand the scope of their service offerings and to enhance the use of their spectrum rights. On a going forward-basis, the Commission should refrain from imposing unnecessary limitations on licensees' spectrum leasing opportunities.

In particular, the Commission should not interject itself – either by implementing overly burdensome information collection requirements or by acting as the "information broker" – into the information sharing arrangements that spectrum lessors and lessees design to facilitate leasing or other service arrangements. The information *already* gathered from spectrum licensees by the Commission for its Universal Licensing System databases is sufficient and is readily accessible to the public.

Critically, the Commission should not, absent demonstrated need, expand its information collection requirements for spectrum licensees for Wireless Radio Services. There simply is no evidence that any additional information gathering is necessary or that market forces alone are insufficient to meet the anticipated information demand. What is plain, however, is that any new mandatory data or information reporting requirements will increase licensee costs and impose additional resource burdens to maintain and update reports to the Commission. This proceeding is not about adding burdens for licensees, but rather it is about making spectrum use policies more flexible.

Nor should the Commission take an active role in encouraging or prohibiting the development of barter markets or brokers for spectrum lease arrangements. Private market forces, rather than regulation, continue to work well for the wireless industry and spectrum licensees should be able to find, on their own, the ways and means to meet their information requirements. There is no reason to think that spectrum licensees will be unable to succeed without Commission intervention and the Commission should avoid trying to micromanage, and thus limit the flexibility of licensees, seeking to make the most out of their spectrum leasing opportunities.

Along the same lines, the Commission should use its Section 10 statutory forbearance authority to adopt a more flexible notification process – rather than a prior approval process – for licensees entering *de facto* transfer of control secondary market arrangements. In addition to providing the Commission with the ability to give lessees their own instrument of authorization, thus keeping the lessee on the hook for any potential rule violations, the notification process also provides the Commission with adequate information to allow it, on its own, to question the parties, and, if necessary, require modification of a particular arrangement. To address the issues surrounding Section 10 forbearance for "mixed service" transactions, *i.e.*, those transactions involving both telecommunications and non-telecommunications service offerings provided over the leased spectrum, the Commission should avail such arrangements to Section 10 forbearance. Because "mixed services" will be a part of the overall spectrum lease arrangement and could well be used in the same manner as "telecommunications services," there is no reason automatically to single out mixed services as ineligible for Section 10 forbearance or other regulatory relief.

Finally, the Commission should refrain from imposing unnecessary and ambiguous eligibility benchmarks to determine whether a particular lease transaction qualifies for forbearance. The *subjective* "competitive market" benchmarks suggested in the *Further Notice* could well create unnecessary ambiguity for spectrum licensees and make the benchmark approach unpredictable and non-useful for parties to gauge their eligibility for forbearance. Indeed, the Commission should be wary of subjective and unstructured forbearance eligibility criteria and attempt to create more objective, easily applied standards for forbearance.

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COMMENTS OF NEXTEL COMMUNICATIONS, INC.

Nextel Communications, Inc. ("Nextel"), by its attorneys, hereby submits these comments in response to the Federal Communications Commission's ("Commission's") Further Notice of Proposed Rulemaking seeking comment on additional ways to facilitate the development of secondary spectrum markets and to promote more flexible and more efficient spectrum use.[1]

I. INTRODUCTION

The Commission should be applauded for its efforts towards improving opportunities for flexible access to spectrum and for crafting innovative spectrum leasing models, paving the way for additional development of a secondary spectrum market. Providing spectrum licensees with maximum flexibility to expand the scope of their service offerings and to make expansive use of their rights is crucial to achieving the utmost public benefit from radio spectrum. The Commission's decision to search for additional ways to streamline secondary market transactions through this *Further Notice* is positive and will lead to more efficient use of spectrum.

[1] Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Deployment of Secondary Markets, *Further Notice of Proposed Rulemaking,* WT Docket No. 00-230, FCC 03-113 (rel. October 6, 2003) ("*Further Notice*").

Nextel is a leading Commercial Mobile Radio Service ("CMRS") provider, offering a range of valuable digital wireless services in its licensed markets nationwide. Like other CMRS carriers, Nextel's ability to enter new markets and to serve new and existing customers is predicated on its continued ability to access sufficient spectrum resources.

Nextel has been and continues to be a "poster child" for flexible spectrum use, demonstrating by its existence and continued growth that flexible use is a positive, pro-competitive force to be encouraged through appropriate and thoughtful Commission policies. By its efforts and creativity, Nextel fashioned a national digital wireless network in the place of what was once only fragmented, site specific SMR licensees. Nextel's digital iDEN technology and intensive cellularized frequency reuse are a far more spectrum efficient use of SMR spectrum than what had come before.

In light of this history and legacy, Nextel supports rational regulatory policies to further increase spectrum flexibility and facilitate secondary market arrangements. In particular, the *Report and Order* offers significant new alternatives to the outright sale of spectrum by licensees. That decision should have an opportunity to be implemented and mature prior to any action by the Commission to "create" spectrum markets. Market forces should predominate and the Commission should not attempt to perform a market-making role nor should it bestow the task upon others. Unlike Commission-endorsed frequency coordinators, there is no need for Commission-endorsed spectrum brokers. Private markets will naturally emerge for spectrum trading if there is a market need.

II. PRIVATE MARKET FORCES SHOULD GOVERN THE EXCHANGE OF SECONDARY MARKET INFORMATION.

In the *Further Notice*, the Commission seeks comment on whether and to what extent it should overtly encourage the establishment of spectrum usage information registries and similar

services, including fostering spectrum brokers and exchange markets.[2] In particular, the Commission seeks comment on whether the private sector, or the market, should determine what types of information parties need for spectrum leasing transactions and whether the Commission itself should take an active role to promote information brokers.[3] As discussed below, Nextel strongly favors a market-based model for spectrum trading.

In general, the Commission should take whatever additional steps it reasonably can to make its Universal Licensing System ("ULS") databases readily accessible to the public. This includes continuation of existing policies of openness, allowing interested parties to download information without undue need for backend manipulation. Indeed, the Commission acknowledges that as part of its responsibility for issuing spectrum licenses and enforcing its rules and policies, it necessarily must collect certain basic, pertinent information from licensees, such as the names of licensees and the geographic areas and frequency bands for which they hold authorizations.[4] This information should be readily available to the public as a resource. The *Report and Order* also confirms the Commission's intention to post in ULS all information it receives either by notification or by application, of all spectrum lease activity.

The *Further Notice* specifically asks whether the Commission should "collect additional information from licensees, spectrum lessees, or any other authorized users about the nature of their operations (e.g., more detail about the geographic area actually covered and the frequencies actually used)" and whether "the collection of more detailed operational information [would] be

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[2] *Further Notice* at ¶ 226.

[3] *Id.* at ¶¶ 226-28.

[4] *Id.* at ¶ 224.

burdensome for affected parties."[5] The Commission should not minimize or take lightly the burden associated with expanding its information collection requirements for the range of spectrum users within the wide umbrella of the Wireless Radio Services, as well as those licensees that may be brought into the flexible use regime as part of the proposals contained in the *Further Notice*.

As an initial matter, the Commission cannot assume that operational information is unavailable from other sources simply because it is not routinely reported in granular form to the Commission. In fact, the collection by the Commission of granular operational information would represent a reversal of well-considered Commission policies to allow licensees the flexibility to make system changes without having constantly to file and refile information with the Commission.[6] New information collection requirements would require a refocus of licensee resources into maintaining and updating reports to the Commission, without any demonstration that such reporting is necessary. As a licensee with well over thirty thousand licenses, Nextel has concerns about any new, mandatory operational reporting requirements and the potential for

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[5] *Id.* at ¶ 225.

[6] For example, the Commission revised its site-by-site licensing procedures for SMR systems because it determined them to be "very cumbersome for systems comprised of several hundred sites because licensees were required to receive individual Commission approval for each site." The Commission also concluded that site-by-site licensing procedures impaired an SMR licensee's ability to respond to changing market conditions and consumer demand. Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band; Implementation of Sections 3(n) and 322 of the Communications Act -- Regulatory Treatment of Mobile Services; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Report and Order*, 12 FCC Rcd 19079 (1997). In addition, the Commission's rules require that a cellular geographic service area is the geographic area considered by the Commission to be served by the cellular system. 47 C.F.R. §22.911 (2003).

enforcement action for failure to update operational information on a real time or near real time basis.

The Commission has no indication that additional information reporting requirements would facilitate secondary spectrum markets or that existing markets have failed to produce innovative arrangements that benefit the parties and the public. The Commission has just adopted a flexible spectrum leasing mechanism that creates intriguing new devices for parties to fashion new leasing arrangements, including two alternative spectrum leasing models and streamlined approval processes for license assignments and transfers. Plainly, some time will be needed before parties are able reasonably to judge whether there is more the Commission should do – other than setting guidelines and stepping back – for a more vibrant secondary market to develop. As a result, the Commission should not reach out and collect new information unless and until it is obviously necessary to a core Commission purpose.

In the short term, a spectrum trading market is unlikely to develop and commoditize, as has to some extent the market for fiber optic transmission capacity. This is because spectrum available to be leased may not correspond readily to the perceived needs of the market on a time, space, location and sufficient flexibility of use basis.[7] A reason a robust brokerage or trading may not develop rapidly, even with Commission encouragement, is that wireless radio services often utilize different technologies and operate consistent with the need to protect against

[7] In the *Spectrum Policy Task Force Report*, the Task Force observed that a significant amount of spectrum remains underutilized or lies fallow, including white spaces of spectrum that are typically not in use for significant periods of time. *See Spectrum Policy Task Force Report*, ET Docket No. 02-135 (rel. Nov. 15, 2002) at 10-11. Further, the Task Force noted that "[i]n light of the preliminary FCC measurements, the acknowledged variability of some types of licensed spectrum users, and the recent advances in technology . . . there is evidence to suggest that spectrum use can be increased significantly." *Id.* at 11.

harmful interference among licensees. The inherent flexibility the Commission has provided CMRS licensees to make decisions about where to build and what technologies to deploy to some degree makes parties less able to freely trade and use spectrum.

The Commission has yet to articulate what it is trying to achieve by fostering spot spectrum markets. Because nothing the Commission has said up until now suggests it is taking the choice of entering or refusing to enter into leasing or trading arrangements away from the spectrum licensee, there appears to be no reason why the Commission should create new processes that could undermine the very flexibility the Commission purported to create in its *Report and Order*.

Thus, Nextel submits that the Commission should not prohibit, nor should it encourage, the development of barter markets or brokers for spectrum lease arrangements. Nor should the Commission attempt to perform this role itself. Nextel's experience demonstrates that entities attuned to market needs can and will find the ways and means to meet their requirements. Unexpected entities can become market makers and, as a matter of basic policy, the Commission should avoid trying to micromanage the development of new markets. Rather than try to specifically define the parameters of successful secondary spectrum markets, the Commission should concentrate on creating more *flexible service rules* for all licensees. Indeed, by too purposefully defining the structure of secondary markets and spectrum trading, the Commission may too narrowly define what it means to have a successful spectrum management policy for secondary markets.

III. THE COMMISSION SHOULD FORBEAR FROM INDIVIDUALIZED PRIOR APPROVAL FOR *DE FACTO* SPECTRUM LEASES.

The *Further Notice* requests comment on "whether to forbear from individual prior review and approval by the Commission for certain categories of leasing arrangements that

would not raise any public interest concerns."[8] In particular, the Commission asks whether it should use its Section 10 statutory forbearance authority to allow certain types of *de facto* lease arrangements, and assignments and transfers of control to proceed without prior Commission approval.

Nextel supports using a notification process, rather than a prior approval process for leasing transactions that involve a transfer of *de facto* control as the Commission has defined that particular form of lease arrangement. Notification is preferable whether the *de facto* lease is a short term or long term lease. Among other things, such a notification process still allows the Commission to provide the lessee with its own instrument of authorization, thus making the lessee directly answerable to the Commission for its actions and for any potential rule violations. Further, because the same information would be furnished in a notification as in an application, the Commission should have sufficient information that would allow it, on its own, to question the parties, and, if necessary, require modification of a particular arrangement after the fact.[9]

Notably, an issue for many Wireless Radio Services licensees is the scope of Section 10 forbearance, which is only available for application by the Commission to telecommunications carriers, and not in "mixed service" situations. Indeed, as the Commission recognizes, "Section 10 forbearance authority applies only to providers of telecommunications services, [thus] we

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[8] *Further Notice* at ¶ 244.

[9] Similar to the requirements the Commission already has specified for inclusion in spectrum leases, the Commission might also consider requiring that all *de facto* lease agreements entered pursuant to a "notification obligation" include an acknowledgement that the Commission has the ability to require modification of an arrangement, even after the lease is signed and the parties are operating under the agreement. Such a requirement would provide the Commission with explicit oversight of these *de facto* lease arrangements entered through a process of notification and provide all parties to the arrangement with notice, while preserving flexibility for spectrum licensees and lessees.

may forbear from applying Section 310(d) requirements only for leases involving telecommunications carriers and telecommunications services."[10] Convergence in today's marketplace and the multitude of diverse entities offering a variety of services makes it more likely than not that Section 10 forbearance would be unavailable for many publicly beneficial arrangements. Nextel thus urges the Commission to do what it can to forebear from requiring prior approval in mixed service situations or to further streamline its processes when Section 10 forbearance may be unavailable.

The Commission has had experience in crafting acceptable arrangements when dealing with "mixed service" situations, as well as the effective transfer or reclassification of spectrum from one service category to another. Indeed, the Commission faced a similar issue when it permitted Specialized Mobile Radio ("SMR") licensees to apply for Business and Industrial/Land Transportation ("B/ILT") channels under its "inter-category sharing" rules.[11] Under these rules, the SMR licensee was permitted to use these channels commercially despite the eligibility criteria that otherwise reserved these channels for private, internal use.[12] As part of this flexible inter-category channel assignment structure, the Commission had to determine

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[10] *Further Notice* at ¶ 275.

[11] Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Memorandum Opinion and Order on Remand*, 14 FCC Rcd 21679 (1999). The Commission acted pursuant to *Fresno Mobile Radio, Inc., et al. v. FCC*, 165 F.3d 965 (D.C. Cir. 1999). There, the D.C. Circuit remanded to the Commission its decision to maintain the requirement that incumbent licensees who have received "extended implementation" authorizations must construct and operate all sites at all frequencies within a certain period or lose the unconstructed frequencies.

[12] Inter-category sharing by SMR licensees was permitted if the B/ILT channel sought by the SMR licensee was unoccupied and if there were no SMR channels available in the licensee's service area. *See* Inter-Category Sharing of Private Mobile Radio Frequencies in the 806/821/851-866 MHz bands, *Order*, 10 FCC Rcd 7350 (1995).

what construction requirements, if any, to impose on incumbent 800 MHz SMR commercial licensees operating wide area systems that included B/ILT channels. The Commission decided to apply the same construction requirements to wide-area incumbents whether operating on SMR channels or B/ILT channels because licensees operating on B/ILT channels were "sufficiently similar" to wide-area incumbent 800 MHz licensees operating on SMR channels and should have "the same flexibility with respect to construction requirements."[13]

The same type of approach should be considered here. Because "mixed services" will be a part of the overall spectrum lease arrangement and could well be used in the same manner as "telecommunications services," there is no reason to single out mixed services as ineligible for some form of forbearance or regulatory relief. Alternatively, if the licensed spectrum at issue could be used flexibly and the acquiring party certifies to the Commission that its intended use is for CMRS, then Section 10 forbearance could apply to the entire transaction, thus allowing the transaction to proceed via notification, rather than requiring an application and prior Commission approval.

IV. THE COMMISSION SHOULD REFRAIN FROM IMPOSING OVERLY SUBJECTIVE CRITERIA TO TRANSACTIONS.

To be eligible for forbearance treatment under Section 10 and thus eligible for notification filings for *de facto* lease agreements, the Commission proposes that the spectrum lessee must satisfy applicable eligibility and use restrictions associated with the leased spectrum. For instance, the *Further Notice* proposes that "[f]or a leasing agreement to be eligible for processing pursuant to this forbearance proposal, the lessee would be required to meet any

[13] Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Memorandum Opinion and Order*, 15 FCC Rcd 17009 (2000).

applicable eligibility limitations and comply with any use restrictions associated with the spectrum it plans to lease. A lessee would also have to meet our basic qualification requirements for holding an authorization."[14] In addition, the lessee must comply with applicable foreign ownership provisions and the arrangement must not raise any "competitive concerns."[15]

While the criteria proposed are intended to serve as eligibility benchmarks to delineate whether a transaction would or would not qualify for forbearance, the proposed "benchmark criteria" could easily assume far more significance than the Commission intends. Indeed, it is foreseeable that a particular transaction might fall in a grey area within the competitive market analysis, making the benchmark approach as a whole unpredictable as to result and thus, not a useful yardstick for parties to gauge their eligibility for forbearance. Indeed, the Commission suggests that to be eligible for forbearance processing under the competitive benchmark proposal, a spectrum lease arrangement "must not result in the loss of service in any geographic area by an independent, facilities-based CMRS provider."[16] It is not obvious, however, what the relevant geographic area would be, what a "loss of service" means and whether a particular carrier would be required, after the lease transaction, to continue serving its entire service area covered by the lease arrangement or only a partial area.

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[14] *Further Notice* at ¶ 247.

[15] *Id.* at ¶¶ 251-262. With respect to the foreign ownership criteria, the Commission asks whether allowing parties to proceed via notification is too risky and an invitation for entities to abuse the process: "What risk exists that parties could attempt to escape the applicability of the foreign ownership limitations by implementing a lease following only notification to the Commission?" *Id.* at ¶ 255. In general because spectrum licensees and, to some degree, lessees, can be sanctioned by the Commission for abusive behavior, no matter what the circumstances of notification or prior approval, there does not seem to be any reason for the Commission to be unduly concerned that a notification process opens the door more broadly to fraud or abuse.

[16] *Id.* at ¶ 258.

Unlike the now retired CMRS spectrum cap, which had a type of one-dimensional, straight-forward aspect to it and thus allowed carriers to plainly understand what would constitute an "acceptable" versus "unacceptable" arrangement, the proposed forbearance eligibility criteria make it far more difficult for licensees to predict whether a proposed transaction qualifies for forbearance. Indeed, by proposing a variety of benchmarks, some of which require the application of subjective judgments, the Commission has unwittingly injected unnecessary uncertainty into the forbearance analysis.

Nextel is strongly in favor of exploring ways to make transaction processing more flexible, predictable and quick. Critically, however, the Commission must avoid adopting new benchmarks, such as the competitive concern benchmark, that have the potential to become regulatory quagmires. Indeed, the proposed competition criteria have the potential to place roadblocks into the very process the Commission is attempting to streamline. The Commission should be wary of subjective and amorphous forbearance eligibility benchmarks and strive for more objective, easily applied standards for forbearance.

V. CONCLUSION

The Commission's efforts to facilitate the advancement of secondary spectrum markets are laudable. Nextel urges the Commission to allow the flexible leasing policies adopted in the *Report and Order* to develop naturally under competitive, private market forces. The Commission should refrain from reversing its deregulatory approach to collecting extraneous

operational information from spectrum users. The imposition of additional data collection procedures, or the promotion of market brokers for spectrum leasing and trading, could undermine the very real progress the Commission just made in its *Report and Order* towards developing vibrant secondary markets.

Respectfully submitted,

NEXTEL COMMUNICATIONS, INC.

/s/ Laura H. Phillips

Laura H. Phillips
Laura S. Gallagher
DRINKER BIDDLE & REATH LLP
1500 K Street, N.W., Suite 1100
Washington, D.C. 20005-1209
(202) 842-8800

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